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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
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15 CORY SPENCER, an individual;
16 DIANA MILENA REED, an
17 individual; and COASTAL
18 PROTECTION RANGERS, INC., a
19 California non-profit public benefit
20 corporation;

21 Plaintiffs,

22 v.

23 LUNADA BAY BOYS; THE
24 INDIVIDUAL MEMBERS OF THE
25 LUNADA BAY BOYS, including but
26 not limited to SANG LEE, BRANT
27 BLAKEMAN, ALAN JOHNSTON
28 aka JALIAN JOHNSTON, MICHAEL
RAE PAPAYANS, ANGELO
FERRARA, FRANK FERRARA,
CHARLIE FERRARA, and N.F.;
CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE
JEFF KEPLEY, in his representative
capacity; and DOES 1 – 10,

Defendants.

Case No. 2:16-cv-02129-SJO (RAOx)

**DEFENDANT JOHNSTON'S NOTICE
OF MOTION AND MOTION FOR
SUMMARY JUDGMENT, OR IN THE
ALTERNATIVE FOR SUMMARY
ADJUDICATION OF CLAIMS;
MEMORANDUM OF POINTS AND
AUTHORITIES (F.R.C.P. 56)**

Hearing Date: August 21, 2017
Hearing Time: 10:00 A.M.
Judge: Hon. James Otero
Courtroom: 10C

1 **TO THE HONORABLE COURT AND TO ALL PARTIES:**

2 PLEASE TAKE NOTICE that on August 21, 2017, at 10:00 a.m., in
3 Department 10C of the United States District Court, located at 350 West
4 First Street, Los Angeles, California 90012, Defendant Alan Johnston
5 (“Defendant”) will request the Court to grant his Motion for Summary
6 Judgment, or in the alternative for summary adjudication of claims, on the
7 Complaint of Plaintiffs Corey Spencer, Diana Milena Reed, and Coastal
8 Protection Rangers, Inc. (collectively “Plaintiffs”) pursuant to Federal Rule of
9 Civil Procedure 56. If for any reason the court does not entirely grant
10 Defendant Johnston’s summary judgment, the Court is requested to grant
11 Defendant Johnston’s partial summary judgment and/or summary
12 adjudication as follows:

13 Summary Judgment for the First Cause of Action for violation of the
14 Bane Act (California Civil Code § 52.1(b)) on the basis that Plaintiffs were
15 not prohibited from exercising their right to recreate in Lunada Bay.

16 Summary Judgment as to the Second Cause of Action for Public
17 Nuisance based on lack of standing.

18 Summary Judgment as to the conspiracy claims alleged in the First
19 and Second Causes of Action based on a failure of evidence.

20 Summary Judgment as to the Sixth Cause of Action for Assault on the
21 basis that Defendant did not do anything to put Plaintiffs in apprehension of
22 immediate injury.

23 Summary Judgment on the Seventh Cause of Action for Battery on the
24 basis that Defendant Johnston did not touch the Plaintiffs with the intent to
25 harm.

26 Summary Judgment as to the Eighth Cause of Action for negligence
27 on the basis that Defendant Johnston did not breach any duty of care.

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This motion is based on this Notice, the Memorandum of Points and Authorities, all exhibits, the Declaration of J. Patrick Carey, the proposed Statement of Uncontroverted Facts, the Court’s file in this action, all matters of which this Court must or may take judicial notice and on such further evidence and argument which may be presented at the hearing on this matter.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 which took place on July 14, 2017.

DATED: July 24, 2017

LAW OFFICES OF J. PATRICK CAREY

By: /s/ J. Patrick Carey
J. Patrick Carey
Attorney for Defendant
ALAN JOHNSTON

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
2 **MOTION FOR SUMMARY JUDGMENT**

3 **I. INTRODUCTION**

4 Plaintiffs allege they have been prohibited from enjoying Lunada Bay,
5 a unique surf break along the cliffs of Palos Verdes in Southern California.
6 In their complaint, Plaintiffs allege that Defendant has engaged in
7 intimidation, assault, and battery to prevent them from surfing at Lunada
8 Bay. Plaintiffs further allege that the Defendants are a criminal street gang
9 within the meaning of California Penal Code § 186.22(f).

10 Plaintiffs Spencer and Coastal Protection Rangers, Inc. (“Coastal”)
11 have never interacted with Defendant Johnston, so their claims against him
12 should be dismissed. The one incident in which Plaintiff Reed interacted
13 with Defendant Johnston was captured on video. The video does not
14 support any of the claims Plaintiff Reed has alleged against Defendant
15 Johnston.

16 Finally, the Plaintiffs lack standing to ask this court for to declare a
17 public nuisance and issue a gang injunction pursuant to Penal Code Section
18 186.22.

19 **II. FACTUAL BACKGROUND**

20 Plaintiff Spencer has never seen Defendant Johnston. Declaration of
21 J. Patrick Carey (“Carey Decl.”), ¶ 3, Exhibit 1, Deposition of Plaintiff Cory
22 Spencer (“Spencer Depo.”), 323:17-20.

23 On February 13, 2016, Defendant Johnston approached Plaintiff Reed
24 at the patio structure at Lunada Bay. Defendant Johnston reached into his
25 backpack and grabbed a can of beer. He asked Plaintiff Reed and her
26 friend if they were drinking and if they wanted a beer. Defendant Johnston
27 then opened his can of beer. A small amount of foam of the beer sprayed
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1 onto Plaintiff Reed’s sweater sleeve and her camera as Defendant Johnston
2 opened the beer. Declaration of J. Patrick Carey (“Carey Decl.”), ¶ 5, Exhibit
3 3, Screenshots from Video of February 13, 2016 incident (“Feb 13 Video”).
4 Plaintiff Reed’s camera was not damaged. Declaration of J. Patrick Carey
5 (“Carey Decl.”), ¶ 4, Exhibit 2, Deposition of Plaintiff Diana Reed (“Reed
6 Depo.”), 176:5-6.

7 Plaintiff Coastal makes no specific allegations against Defendant
8 Johnston and has not provided any evidence to support the causes of action
9 against Defendant Johnston.

10 **III. ARGUMENT**

11 **A. LEGAL STANDARD FOR SUMMARY JUDGMENT**

12 Summary judgment is appropriate where there is no genuine dispute
13 as to any material fact and the moving party is entitled to a judgment as a
14 matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317,
15 322 (1986). The moving party must demonstrate that there is no dispute as
16 to the material facts of the case. Courts will focus on the facts that might
17 affect the outcome and will disregard all “facts that are irrelevant and
18 unnecessary.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

19 **B. THERE IS NO EVIDENCE THAT DEFENDANT JOHNSTON**
20 **VIOLATED THE BANE ACT AS ALLEGED IN THE FIRST**
21 **CAUSE OF ACTION**

22 California’s Bane Act provides legal or equitable relief for an “individual
23 whose exercise or enjoyment of [federal or state constitutional] rights ... has
24 been interfered with, or attempted to be interfered with” California Civil
25 Code §52.1(b). Thus, Plaintiffs must prove that Defendant Johnston
26 interfered with, or attempted to interfere with, the Plaintiffs’ exercise or
27 enjoyment of their constitutional rights.

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1 Defendant Johnston did not meet or interact with Plaintiff Spencer. His
2 one interaction with Plaintiff Reed on February 13, 2016 was brief, and he
3 never interfered with her constitutional rights. There is no genuine issue of
4 material fact. Plaintiffs cannot prove this claim.

5 **C. PLAINTIFF'S DO NOT HAVE STANDING FOR THE SECOND**
6 **CAUSE OF ACTION FOR PUBLIC NUISANCE**

7 Standing to bring a public nuisance action is limited to either (1)
8 individuals who have suffered injuries different in kind or in degree from
9 those suffered by other members of the public, or (2) to the State. *Cal. Civ.*
10 *Code Sec. 3493*. Otherwise, California Code of Civil Procedure section 731
11 explicitly authorizes prosecutors to bring public nuisance actions in the name
12 of the People:

13 "A civil action may be brought in the name of the People of the
14 State of California to abate a public nuisance, as the same is
15 defined in Civ. Code. Sec. 3479, by the district attorney of any
16 county in which the nuisance exists, or by the city attorney of any
17 town or city in which such nuisance exists." *C.C.P. § 731*.

18 A public nuisance cannot be abated by a private person. *County of*
19 *Yolo v. Sacramento*, (1868) 36 Cal. 193; *Hasbrouck v. Cavill*, (1921) 54 CA
20 1, 200 P 979; *San Joaquin & Kings River Canal & Irrigation Co. v. Egenhoff*
21 (1943, Cal App) 61 Cal App 2d 82, 141 P2d 939. Plaintiff, in an action for
22 nuisance, cannot recover damages for injuries which affect the public
23 generally, but if he has suffered damages peculiar to himself, it becomes, to
24 that extent, private nuisance for which he may recover. *Grigsby v. Clear*
25 *Lake Water Works, Co.* (1870) 40 Cal. 396.

26 Plaintiffs are private parties. There is no genuine issue of material
27 fact. The Plaintiffs do not have standing to bring this claim.

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1 **D. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE AS**
2 **TO THE CONSPIRACY CLAIM**

3 The Plaintiffs do not have evidence sufficient to prove that Defendant
4 Johnston is an alleged co-conspirator, and therefore an alleged criminal
5 street gang member.

6 “Because civil conspiracy is so easy to allege, plaintiffs have a weighty
7 burden to prove it. They must show that each member of the conspiracy
8 acted in concert and came to a mutual understanding to accomplish a
9 common and unlawful plan, and that one or more of them committed an
10 overt act to further it. It is not enough that the [alleged conspirators] knew of
11 an intended wrongful act, they had to agree – expressly or tacitly – to
12 achieve it. Unless there is such a meeting of the minds, ‘the independent
13 acts of two or more wrongdoers do not amount to a conspiracy.’ *Choate v.*
14 *County of Orange*, 86 Cal.App.4th 312, 333 (2000) (citations omitted).

15 Plaintiffs have presented no evidence that Defendant Johnston is a co-
16 conspirator or criminal street gang member. There is no genuine issue of
17 material fact. Plaintiffs cannot prove this claim.

18 **E. DEFENDANT JOHNSTON DID NOT ASSAULT THE**
19 **PLAINTIFFS**

20 Assault is the unlawful attempt, couple with a present ability, to commit
21 a violent injury upon the person of another. *Tekle v. United States* (9th Cir.
22 2007) 511 F. 3d 839, 855. To establish civil assault, a plaintiff would need to
23 establish that a defendant threatened a harmful and offensive touching
24 causing a harm. *Id.*

25 Defendant Johnston did not meet or interact with Plaintiff Spencer or
26 Plaintiff Coastal. His one interaction with Defendant Reed does not amount
27 to an assault as he did not touch her nor did he intend to injure her.

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1 **F. DEFENDANT JOHNSTON DID NOT COMMIT A BATTERY**

2 Battery is the willful and unlawful use of force or violence upon another
3 person. *Tekle v. United States* (9th Cir. 2007) 511 F. 3d 839, 855.
4 Defendant must have done an action that causes injury, damage, loss, or
5 harm to the plaintiff. *Id.*

6 Defendant Johnston did not meet or interact with Plaintiff Spencer or
7 Plaintiff Coastal. His one interaction with Defendant Reed does not amount
8 to an assault. The act alleged here, the opening of a bear can, did not
9 cause injury, damage, loss, or harm to the plaintiff. There is no genuine
10 material factual dispute.

11 **G. THERE IS NO GENUINE, MATERIAL FACTUAL DISPUTE**
12 **THAT CAN SUPPORT A CLAIM FOR NEGLIGENCE**

13 “The elements of a negligence cause of action are the existence of a
14 legal duty of care, breach of that duty, and proximate cause resulting in
15 injury.” *McIntyre v. Colonies-Pac., LLC*, 228 Cal.App.4th 664, 671 (2014).

16 Defendant Johnston did not owe, nor did he breach, any duty of care.
17 The Plaintiff’s did not suffer an injury. There is no genuine issue of material
18 fact. Plaintiffs cannot prove this claim.

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26 **IV. CONCLUSION**

27 Based on the foregoing, Defendant Johnston respectfully requests this
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1 honorable Court to grant this motion in its entirety.

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DATED: July 24, 2017

LAW OFFICES OF J. PATRICK CAREY

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By: /s/ J. Patrick Carey

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J. Patrick Carey
Attorney for Defendant
ALAN JOHNSTON

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